Filed 9/30/02 In re Joanna R. CA5

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

In re JOANNA R. et al., Persons Coming Under the Juvenile Court Law.	
FRESNO COUNTY DEPARTMENT OF CHILDREN & FAMILY SERVICES, Plaintiff and Respondent, v. RHONDA S., Defendant and Appellant.	F039258 (Super. Ct. No. 01CEJ300100) **OPINION**

APPEAL from a judgment of the Superior Court of Fresno County. A. Dennis Caeton, Judge.

Judith E. Ganz, under appointment by the Court of Appeal, for Defendant and Appellant.

Phillip S. Cronin, Fresno County Counsel, Howard K. Watkins, Deputy County Counsel, for Plaintiff and Respondent.

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Joanna R., born in 1989, and George E., born in 1988, were originally removed from their mother's care in June 1996 as a result of a petition filed under Welfare and Institutions Code section 300.[1] The children were placed with their maternal grandmother. Joanna was eventually allowed extended visitation with her mother Rhonda S. (appellant). The Fresno County Department of Children and Family Services (DCFS) later filed a supplemental juvenile dependency petition pursuant to section 387, requesting Joanna's removal from appellant's home. Appellant, in turn, filed a section 388 petition for modification, requesting removal of the children from the grandmother's care.

The juvenile court denied the section 388 petition and found the allegations of the section 387 petition true. Appellant challenges a number of the juvenile court's orders. We affirm.

PROCEDURAL AND FACTUAL HISTORIES

In June 1996, law enforcement officers responded to a report that appellant slapped and punched in the face one of Joanna and George's older siblings. Joanna and George were taken into protective custody and placed with their maternal grandmother and step-grandfather in Bakersfield, California. Appellant acknowledged she had relapsed into a longstanding alcohol problem.

On June 18, 1996, juvenile dependency petitions were filed in Kern County under section 300, subdivisions (b), (g), and (j), alleging the failure or inability of appellant to supervise or protect the children adequately and to provide regular care. Verbal abuse of the children was also alleged. At the jurisdiction hearing in July 1996, the juvenile court subsequently found the minors to be persons described by section 300, subdivisions (b),

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[1]All statutory references are to the Welfare and Institutions Code unless otherwise indicated.

(g), and (j). At the disposition hearing in August 1996, the court found, based on clear and convincing evidence, there would be substantial danger to the physical health of the minors if they were returned home. The court ordered family reunification services.

At a review hearing in May 1997, the court found appellant had made substantial compliance with the case plan and substantial progress toward alleviating or mitigating the causes for the minors' placement in foster care. The court continued family reunification services to appellant and allowed her biweekly visitation with the children. However, by November 1997, the court found there was not a substantial probability the minors would be returned to appellant and terminated reunification services. Appellant appealed, but we dismissed her appeal after she failed to file any briefing. (See case No. F030042.) Appellant unsuccessfully attempted to regain custody of the minors.

According to a May 1998 social study report, George continued to have numerous behavioral problems, most noticeably in the areas of anger and impulse control. Joanna, however, appeared to be working hard to improve her school performance. In August 1998, George was diagnosed with leukemia and was hospitalized in Fresno County for approximately two months. By November 1998, George was receiving home study due to his illness and Joanna's grades had fallen. Appellant moved to Fresno and had approved unsupervised visits with the children. The children enjoyed visiting with appellant but were uncertain about living with her. By December 1998, Joanna expressed an interest in living with appellant.

On December 23, 1998, the Kern County Superior Court transferred the case to Fresno County, noting appellant and the minors' legal residence was in Fresno County. According to a July 1999 social worker's report, George's leukemia was in remission, his grandmother properly cared for his needs, and George enjoyed living with his grandmother. Joanna also wanted to stay with her grandmother. The social worker found sufficient detriment to warrant continued dependency. At a September 1999 review hearing, the juvenile court found the appropriate plan for the children remained long-term

foster care. By February 2000, the social worker noted George requested overnight visits with appellant, and Joanna showed strong feelings toward being with her mother.

On May 23, 2000, appellant filed a section 388 petition for modification of the visitation order to allow an extended visit with the minors in her home. The court gave the DCFS discretion to extend Joanna's visits with appellant but denied the petition as to George. At the August 29, 2000 and February 20, 2001, review hearings, the court ordered reunification services continued for appellant and Joanna and for the minors to remain as placed. The DCFS reported that Joanna appeared to be doing well living with her mother.

In March 2001, a hospital social worker reported that while George had been in remission for over two years, "[he] capitalizes on his illness to manipulate adults and authority figures." The social worker opined George needed to be in a school atmosphere to learn socialization skills, but George's grandmother requested he be placed on independent studies because of his illness. The court ordered the DCFS to follow up on George's counseling needs and poor school performance. In May 2001, an investigator reported the house was somewhat dirty and cluttered, and the backyard contained numerous items of junk, including cars, trucks, trailers, tractors, caterpillars, motorcycles, mattresses, old machinery, tires, barrels, boxes, and tools.

On June 14, 2001, counsel for Joanna filed an ex parte application requesting Joanna's removal from appellant's home and claiming Joanna fought with appellant constantly and threatened to run away. On June 26, 2001, the court ordered, pending hearing, that Joanna be removed from appellant's care and placed back with her grandmother. The court also directed the DCFS to file a section 387 petition if it intended to remove Joanna from appellant's home and return her to her grandmother's care. On June 28, 2001, a supplemental juvenile dependency petition was filed under section 387 alleging that Joanna was very unhappy living with her mother, fighting with

her constantly, and that a therapist recommended Joanna be returned to her grandmother's home.

At the detention hearing on June 29, 2001, the juvenile court found the DCFS failed to make a prima facie showing and continued the matter. On July 2, 2001, a second supplemental juvenile dependency petition was filed under section 387, alleging it was in Joanna's best interest to be placed with her maternal grandmother because she was at a high risk of running away from her mother. At the detention hearing on July 3, 2001, the DCFS withdrew the July 2, 2001, petition and proceeded on the original June 28, 2001, petition. The court denied appellant's demurrer to the petition and found the DCFS established a prima facie case. The court ordered conjoint counseling for appellant.

On July 24, 2001, appellant filed a section 388 petition for modification, requesting removal of both Joanna and George from the grandmother's home. The petition alleged that in April 2001, the Kern County District Attorney's Office filed criminal charges against the minors' step-grandfather for illegal transportation, disposal, and storage of hazardous waste at his home. The petition also alleged that, during two inspections in June and November 2000, the Kern County Environmental Services Department found the presence of toxic chemicals, debris, garbage, and junk vehicles on the grandparents' property. The petition also noted that, during an inspection in May 2001, the Fresno County District Attorney's Office found the interior of the house very messy and dirty, with an open gate allowing access to the yard area which contained junk vehicles, trucks, trailers, tractors, old mattresses, tires, and barrels. The criminal charges against the minors' step-grandfather were subsequently dismissed. The court denied appellant's section 388 petition, finding insufficient evidence.

At the jurisdiction and review hearings on August 29 and September 4, 2001, the juvenile court found the allegations of the section 387 petition true with respect to Joanna. Joanna remained placed with her grandmother. The court also found long-term

foster care to be the appropriate plan for George. On October 19, 2001, the court set the contested disposition hearing for trial.

Appellant appealed on October 26, 2001. Her notice of appeal states, in relevant part:

> "**I appeal from the findings and orders of the court *(specify date of order or describe order)*:** August 29, 2001 denial of [appellant's] … [section] 388 motion regarding both minors. September 4, 2001 finding and order that long term foster care with MGMO [maternal grandmother] remains most appropriate plan for minor George [E.]. September 4, 2001 order not [changing] placement of minor Joanna [R.] with MGMO."

DISCUSSION

Appellant maintains the juvenile court committed reversible error in 1) removing Joanna from her care at a statutorily unauthorized hearing, rendering all subsequent proceedings void; 2) overruling her demurrer to the section 387 petition; 3) sustaining the section 387 petition; and 4) denying her section 388 petition. The DCFS contends the first three claims are waived based on appellant's failure to timely appeal them and/or reference the pertinent orders in her notice of appeal. The DCFS's position is well-taken.

I. Waiver

Appellant's first two claims relate to the June 26, 2001, detention proceeding and the July 3, 2001, order overruling her demurrer to the section 387 petition. All post-dispositional orders in juvenile dependency matters are directly appealable without limitation, except for post-1994 orders setting a section 366.26 hearing. (§§ 395, 366.26, subd. (l).) Appellate jurisdiction to review an appealable order depends upon a timely notice of appeal. (*In re Elizabeth G.* (1988) 205 Cal.App.3d 1327, 1331.) Appellant never appealed these orders. An appeal from the most recent order entered in a dependency matter may not challenge prior orders for which the statutory time for filing an appeal has passed. (*In re Elizabeth M.* (1991) 232 Cal.App.3d 553, 563.) Therefore,

these two claims have been waived. (*Steve J. v. Superior Court* (1995) 35 Cal.App.4th 798, 811.)

With respect to appellant's third claim, we recognize the notice of appeal does not specifically appeal the juvenile court's finding and order sustaining the section 387 petition. Nonetheless, it does reference the September 4, 2001, proceeding at which the court sustained the section 387 petition. We liberally construe the notice of appeal in favor of its sufficiency. (*In re Tracy Z.* (1987) 195 Cal.App.3d 107, 112; see also Cal. Rules of Court, rule 1(a); *D'Avola v. Anderson* (1996) 47 Cal.App.4th 358, 361.) Therefore, we address the merits of appellant's claims of error by the court in sustaining the section 387 petition and denying the section 388 petition.

II. Section 387 petition

Appellant argues there is insufficient evidence to sustain the section 387 petition. Specifically, appellant claims the evidence fails to support a finding that Joanna was not protected in appellant's home. Appellant also claims the DCFS failed to implement court-ordered reasonable services that would have avoided removal. We disagree.

In order to remove a child from a parent's physical custody on the basis of a section 387 petition, the court must find that the previous disposition was not effective in the rehabilitation or protection of the child. Further, the court must find by clear and convincing evidence that there is a substantial danger to the physical health, safety, protection, or physical or emotional well-being of the minor and there are no reasonable means to protect the minor's physical health without removing him or her from the parent's physical custody. (§ 361, subd. (c)(1), and § 387, subd. (a); *In re Paul E.* (1995) 39 Cal.App.4th 996, 1000-1003.)

On appeal, the appropriate standard of review is the substantial evidence test. "Thus, in assessing this assignment of error, 'the substantial evidence test applies to determine the existence of the clear and convincing standard of proof ….' [Citation.]" (*In re Basilio T.* (1992) 4 Cal.App.4th 155, 170.)

In this case, there is sufficient evidence of substantial danger to Joanna. Joanna's therapist opined Joanna was at a high risk of running away while in appellant's care. Joanna argued with appellant constantly and did not attend school regularly. The therapist concluded Joanna was at a high risk to use drugs and alcohol in her mother's care based on her anger toward appellant and depression resulting from separation from her grandparents. In addition, there is also sufficient evidence to support the finding there were no reasonable means to protect Joanna without removing her from appellant's custody. Again, Joanna's therapist opined Joanna did not have a bond with her mother and, in fact, expressed considerable anger toward her mother, despite prior counseling sessions. Given Joanna's high risk of running away, it is difficult to discern any alternative means to protect Joanna in appellant's care. Appellant's suggestion that conjoint counseling sessions would have prevented Joanna's removal is unconvincing, particularly in light of the family's prior unsuccessful efforts with reunification services and the extreme dysfunctional relationships within the family.

In sum, we find substantial evidence supports the juvenile court's findings to sustain the section 387 petition.

III. Section 388 petition

Appellant next contends the juvenile court abused its discretion in denying her section 388 petition. Appellant argues Joanna and George were placed on unsafe property in substandard condition, which was not in the minors' best interests. We disagree.

A section 388 petition "lies to change or set aside any order of the juvenile court in the action from the time the child is made a dependent child of the juvenile court [citations], including the order after a permanency planning hearing." (*In re Jasmon O.* (1994) 8 Cal.4th 398, 415.) Section 388 provides:

> "(a) Any parent or other person having an interest in a child who is a dependent child of the juvenile court or the child himself or herself through

> a properly appointed guardian may, upon grounds of change of circumstance or new evidence, petition the court in the same action in which the child was found to be a dependent child of the juvenile court or in which a guardianship was ordered pursuant to Section 360 for a hearing to change, modify, or set aside any order of court previously made or to terminate the jurisdiction of the court. The petition shall be verified and, if made by a person other than the child, shall state the petitioner's relationship to or interest in the child and shall set forth in concise language any change of circumstance or new evidence which are alleged to require the change of order or termination of jurisdiction. [¶] … [¶]
>
> "(c) If it appears that the best interests of the child may be promoted by the proposed change of order … or termination of jurisdiction, the court shall order that a hearing be held and shall give prior notice, or cause prior notice to be given, to the persons and by the means prescribed by Section 386, and, in those instances in which the means of giving notice is not prescribed by those sections, then by means the court prescribes."

The parent bears the burden of showing that a change of circumstance exists and the proposed change is in the child's best interest. (*In re Casey D.* (1999) 70 Cal.App.4th 38, 47.) If the petition presents any evidence that a hearing would promote the best interests of the child, the court will order the hearing. (*In re Jasmon O.*, *supra*, 8 Cal.4th at p. 415.) The petition must be liberally construed in favor of its sufficiency. (*Ibid.*; see also Cal. Rules of Court, rule 1432(a).)

A petitioner's burden on a section 388 petition "is to show by a preponderance of the evidence that modifying the extant order promotes the child's best interests." (*In re John F.* (1994) 27 Cal.App.4th 1365, 1375-1376; accord *In re Kimberly F.* (1997) 56 Cal.App.4th 519, 526-527, fn. 5.) In determining whether the best interests of the child warrant a change in custody, the juvenile court should consider three factors: "(1) the seriousness of the problem which led to the dependency, and the reason for any continuation of that problem; (2) the strength of relative bonds between the dependent children to *both* parent and caretakers; and (3) the degree to which the problem may be easily removed or ameliorated, and the degree to which it actually has been." (*Id.* at

p. 532.) This list of factors is not meant to be exhaustive, but it does provide a reasoned basis on which to evaluate a section 388 motion. (*Ibid.*)

The ruling on a section 388 petition is "committed to the sound discretion of the juvenile court, and the trial court's ruling should not be disturbed on appeal unless an abuse of discretion is clearly established." (*In re Stephanie M.* (1994) 7 Cal.4th 295, 318.) "'The appropriate test for abuse of discretion is whether the trial court exceeded the bounds of reason. When two or more inferences can reasonably be deduced from the facts, the reviewing court has no authority to substitute its decision for that of the trial court.' [Citations.]" (*Id.* at pp. 318-319.)

Applying these principles here, we conclude the juvenile court properly denied appellant's petition. Appellant's petition alleged there existed substandard conditions on the grandmother's property, specifically, the presence of toxic chemicals and waste, debris, garbage, junk vehicles, mattresses, tires, and barrels. The critical question is whether the best interests of the children might be promoted by the proposed change of order, which in appellant's case is the return of the children to her care.

Appellant relies principally on the following in support of her petition: 1) an unfiled, unsigned criminal complaint against the step-grandfather for unlawful transportation, dumping, and disposal of hazardous waste from January 1999 to March 2001; 2) Kern County Environmental Health Services Department inspection reports for the grandparents' property during the year 2000; and 3) a May 2001 investigation report from the Fresno County District Attorney's Office.

We note the pending criminal charges against the step-grandfather were dismissed in July 2001. Evidence was presented that, since the 2000 inspection reports, the grandparents' home had been cleaned up. The May 2001 investigation report noted there were no unusual odors in the home, the temperature was comfortable, the refrigerator contained fresh and frozen food, and the bathroom was clean. The investigator observed that the backyard contained numerous items of junk, but the children had a separate area

in which to play. Photographs of the property taken in August 2001 demonstrated it had been improved since the previous year and the children had a safe, clean area to play.

In addition, according to an August 7, 2001, social worker's report:

> "[Two social workers] made an unannounced home call to the [grandparents'] home …. The living room was a little cluttered, but there were not any cobwebs, rodents or insects in or around the home. The home was clean, but could use a picking up.… The [kitchen] floor was clean, there were clean dishes lying on the counter drying, there were some papers and other clutter on the floor, but it was basically clean.… The bathroom was clean and free of any clutter. The utilities were in working order.… The patio which was once covered with junk, was cleaned off with only a few things on it.… There was not anything dangerous around the yard the children could get seriously injured on.… Overall, the home is cluttered, but not in any way unhealthful for the children to live in."

Furthermore, Joanna's therapist opined that the only home Joanna has known has been with her grandparents, and there appears to be no bond between Joanna and her mother. The therapist also concluded Joanna was at a high risk of getting into serious trouble if she were returned to appellant's care. George, in turn, told an investigator that he likes living with his grandparents and does not want to live with anyone else, particularly appellant who smokes in the home. George's leukemia went into remission while he was living with his grandparents and he has been happy and comfortable in that environment. A social worker also concluded George is emotionally attached to his grandmother and has many friends in his grandmother's neighborhood. It is difficult to see how changing Joanna and George's placement would be in their best interests.

On this record, appellant has failed to show the best interests of the children would be furthered by the proposed modification. Thus, we find the juvenile court did not abuse its discretion in denying the section 388 petition.

DISPOSITION

The orders sustaining the section 387 petition and denying the section 388 petition are affirmed.

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Wiseman, J.

WE CONCUR:

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Vartabedian, Acting P.J.

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Harris, J.